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No. 99-1945

In The

Supreme Court, U.S.
FILED
JUL 17 2000
CLERK

SUPREME COURT OF THE UNITED STATES

DIANE KUHNEL, individually and on behalf of all other Workers' Compensation Lien Payers similarly situated,

Petitioners,

vs.

CNA INSURANCE COMPANIES, a Workers' Compensation Lien Payee, CONTINENTAL CASUALTY CO., AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, TRANSCONTINENTAL INSURANCE COMPANY, TRANSPORTATION INSURANCE COMPANY, and VALLEY FORGE INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the New Jersey Superior Court, Appellate Division

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In a class action does a state court decision that applies the benefit of its ruling to the Petitioner/class representative and thereafter prospectively only, while denying the similarly situated class members a remedy, violate the Fourteenth Amendment of the United States Constitution by denying petitioners their due process and equal protection rights?

Does a state court that adopted the federal retroactivity doctrine and continues to use that doctrine after it has been overruled by the Supreme Court of the United States violate the Supremacy Clause of the United States Constitution?

Do state courts have more discretion than federal courts to pick and choose who shall have the benefit of a ruling when to do so has been found to be a violation of a constitutionally grounded, fundamental right of equal treatment of litigants?

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Petitioners, Diane Kuhnel, individually and on behalf of all other Workers' Compensation Lien Payers similarly situated, respectfully request that a writ of certiorari be issued to review the judgment of the New Jersey Superior Court, Appellate Division, in this case.

OPINIONS BELOW

The New Jersey Supreme Court denial of certification is not published and unreported. The New Jersey Superior Court, Appellate Division, is reported at Kuhnel v. CNA Insurance Companies, 322 N.J. Super. 568 (1999). The opinion of the New Jersey Superior Court, Chancery Division, sub-proceeding Docket Number ATL-C-184-94 made November 6, 1997 is not published and unreported.

STATEMENT OF JURISDICTION

The decision of the New Jersey Superior Court, Appellate Division was made on June 30, 1999. The New Jersey Supreme Court denied petitioners' application for certification on January 21, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

SUMMARY OF RESPONDENTS' ARGUMENT

Respondents admit that the trial court applied limited retroactivity to its decision (see Respondents' Brief in Opposition, Questions Presented) and yet contend that trial court's decision was in accordance with James B. Beam Distilling Co. v. Georgia, et al, 501 U.S. 529 (1991) and Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993), which clearly held that limited retroactivity was unconstitutional and not an option available to lower courts in the federal system.

Respondents seem to infer that the claims of the class members as parties to the action below were somehow barred by procedural requirements or res judicata and, therefore, excluded from the Harper and Beam holdings. Finally, Respondents attempt to show that Judge Gibson's decision below did not exclude all pending cases, suggesting that claims not yet in existence could pass for pending cases.

ARGUMENT

Respondents claim that there was no conflict with decisions of the United States Supreme Court and that the holding by the New Jersey state court in the present case was consistent with the decisions in Harper and Beam, inferring that the class members were denied a remedy and were barred from the benefits of the decision, "...by procedural requirements or res judicata" Beam, 501 U.S. at 544, or "...cases (not) still open on direct review..." Harper, 509 U.S. at 97.

Unfortunately, the Respondents do not point out or even allege that the class claims were not open to direct review because they clearly were; or that res judicata applied because it clearly did not; or, that there was a procedural requirement which barred the class members, because no such procedural requirement was ever raised or now exists.

The trial court's decision to apply the benefits of its ruling to the named Petitioner/class representative and not to the similarly situated class members was in fact an application of limited retroactivity, in direct contravention to the Harper and Beam decisions. Respondents' "Point I" of its argument to the New Jersey Appellate Division reads, "The trial court properly applied limited retroactivity to its holding". (Page 7, Reply Brief, Superior Court Of New Jersey, Appellate Division) They continued to argue (in their brief) that limited retroactivity was

consistent with New Jersey law, which had been based on the holding in Chevron Oil v. Huson, 404 U.S. 97 (1971), before it was modified by this Court, declaring the application of limited retroactivity unconstitutional. Now, however, since they have become aware that Beam, Harper and other cases have significantly overruled Chevron, they retreat from their original argument and contend instead that the lower court's decision conforms to Harper and Beam. It clearly does not.

Its most obvious obfuscation, however, is its attempt to confuse this Court by quoting the lower court's decision and arguing a few fortuitous and meaningless words from that decision.

Respondents seem to contend that Judge Gibson's decision only excluded those members of the Class that would have been excluded by Beam and Harper; i.e., barred by procedural requirements or res judicata, or who had no right of direct review, but that is patently false and misleading. No such bar exists or existed, nor have Respondents suggested any.

They then suggest that because Judge Gibson's decision says, "to any other Petitioners similarly situated who have not yet gone to judgment or reached an agreement incorporated in a writing or a release" (See Appendix C to Petition for Writ of Cert., p. 28C) that it somehow changed or avoided the limited retroactivity label they had already given it. It did not.

Respondents say that the Court, by using the words similarly situated, inferred that other similarly situated Petitioners could recover. This of course is a contradiction in terms, as will become clear below.

Diane Kuhnel was injured while working. Her workers' compensation attorney recovered workers'compensation benefits for her from her employer's insurance company, but because a third-party had been negligent in causing her injury, she hired a

personal injury attorney to prosecute her third party claim. Because New Jersey prohibits double recoveries, it provides in N.J.S.A. 34:15-40 of Workers Compensation Statute that the insurance company has a reimbursable lien for certain payments they made from any third-party recovery. Years later when she settled her third-party action, she requested the amount of the lien from the workers' compensation carrier. The company sent her a lien letter demanding payment for 'x' dollars, which was paid from her third-party recovery. In this subsequent action the Court found that the insurance company had included several items and amounts not permitted by statute and ordered that the lien be reduced by the illegal charges.

This process of paying insurance company liens from third-party recovery is repeated thousands of times each year in New Jersey. This lien transaction is not part of any court proceeding and there are no orders, judgments or releases entered or executed. There is merely a demand letter and subsequent payment from the third-party recovery. It is similar to a seller of a home requesting a payoff statement from the mortgage holder so that the mortgage can be paid off out of the proceeds of the sale.

When the original complaint was filed, it described the class members as those people similarly situated to the Petitioner/ class representative whose claim was ripe for litigation, thereby requiring class membership to include only those whose claims were ripe for litigation. All class members had to be similarly situated with the Petitioner, and like the Petitioner/ class representative, had to have received lien letters and paid the requested amounts that included those items declared illegal. Judge Gibson's language ("who have not yet gone to....an agreement incorporated by a writing...", see Appendix C to Petition for Writ of Cert., p. 28C) could only have encompassed people who had not received and paid a lien letter; that is to say, only people to whom no cause of action had yet accrued, which effectively made his decision purely prospective and any argument to the contrary is spurious and deceptive. Harper and Beam

sought to make a holding applicable to the Petitioner and those whose cause of action had already accrued and who were litigants in pending cases. This is the exact scenario presented to the lower court in the case at bar.

Judge Gibson's unfortunate language did not effectively extend the benefits of his holding to anyone other than those with prospective claims. He may have unwittingly been unaware of that fact, but his words were of no significant import to those with pending claims. Put another way, there were no existing claims pending for violation of Section 40 that were not excluded by his decision. And while there were likely to be potential claims, they would be covered by the prospective application of the decision in the future.

Respondents say that the class claims were closed, but what they mean is that the Respondents had already asserted and collected their improper lien, taken the illegal money and closed their file. No court was involved in that transaction and the only burden to the determination of damages would be on producing the company's records of a breakdown of payments received. No court or judicial system would be burdened and Respondents have never produced any evidence to that effect.

Respondents contend that somehow Petitioners' opportunity to object to lien amounts when they are asserted constitutes a judicial proceeding in which they were litigants. This is not the case as illustrated above. In addition, the Petitioner/ class representative had the same opportunity to contest the amount of the lien and yet the court did not consider that opportunity relevant. Furthermore, Petitioners had no reason to believe that the lien letter they received was not accurate and within legal standards.

Respondents clumsily say that the class had two types of claimants, open and closed. This is a shameful mischaracterization. The definition of the class was as clear as it

was routine, that they were similarly situated to the Petitioner/class representative, whose claim had matured by virtue of Respondents' demand for payment of its lien and withholding of monies from her recovery to pay it. Her claim was a closed claim, as were those of all class members. Open claims, as we have said above, are not claims at all, but merely potential claims that could arise in the future.

Respondents make much of the lack of notice to the class that was certified, asserting the New Jersey Appellate Division reference to an unperfected class. Both the Appellate Division and Respondents were mistaken and had not realized that the class in Kuhnel was certified under New Jersey Court Rule, R. 4:32-1(b)(2) which does not require notice. In a (b)(2) class, once the class is certified, the members of the class are automatically bound as parties to the action by any declaratory judgment. The trial court decision was a declaratory judgment and bound all class members who were parties. Therefore no notice was necessary.

Lastly, the Respondents attempt to say that the Petitioners are asking this Court to eliminate a state court's discretion to apply a decision prospectively or retroactively. This is simply not true. The Petitioners only ask that when the courts are applying a decision, that they apply that decision equally to all, similarly situated members of a class action and not prospectively to some and retroactively to others.

CONCLUSION

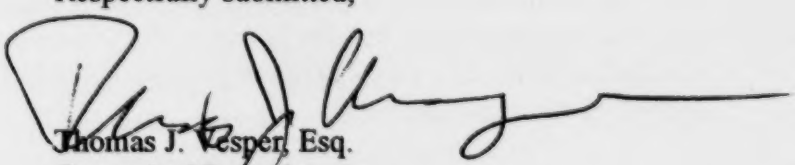
This is an unencumbered, clear cut example of a decision that could not have been made by a federal court. Both parties admit that the lower court applied its decision with limited retroactivity to the named Petitioner, but not to the class members who were similarly situated and were parties to the action, and whose claims had ripened. This result would not likely have happened in the absence of this Court's earlier decision in Chevron which was adopted by New Jersey courts and followed in

the case at bar. But this Court has repudiated that part of the Chevron holding which permitted limited retroactivity and has done so on constitutional grounds. The unconstitutional deprivation of rights that caused this court to repudiate Chevron has occurred here and undoubtedly continues to occur at the state court level nationwide. This unconstitutional doctrine, which was initiated by this Court, has since been prohibited in the federal courts and now must be prohibited in state courts as well.

The granting of this petition is necessary to make clear to all courts and litigants whether or not the Harper, Beam and other Supreme Court holdings on the Retroactivity Doctrine govern just the federal courts or the entire country. If those decisions, as they say, are based on constitutional grounds and "...derives from the integrity of Judicial Review which does not justify applying principles determined to be wrong to litigants who are or may still come to court.", as Justice Blackmun wrote in Beam 501 U.S. at 547-548, then granting this Writ is the just thing to do.

Accordingly, the petitioners respectfully request that this petition for Writ of Certiorari be granted.

Respectfully submitted,



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